No. 85-208

SUPREME COURT, U.S.
FILED
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IN THE

Supreme Court of the United States

October Term, 1985

EDWARD HILL LOVITT,
wwi Ermie Lovitt,
Debtor

GORDON H. CHEADLE and PATRICIA J. CHEADLE,
husband and wife,
Petitioners,

v.

APPLEATCHEE RIDERS ASSOCIATION,
CYPRUS MINES CORPORATION,
and
ASAMERA MINERALS (U.S.), INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Michael A. Small*
Paul J. Lawrence
PRESTON, THORGRIMSON,
ELLIS & HOLMAN
2000 IBM Building
Seattle, WA 98101
(206) 623-7580
Attorneys for Respondents
* *Counsel of Record*

aBCD Legal Printers Seattle Washington

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RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Does a non-party to a bankruptcy proceeding have standing to attack the validity of an order entered in that proceeding which purports to dispose of the non-party's property?

2. Does Fed. R. Civ. P. 60(b) prohibit a motion to vacate a bankruptcy order more than one year after the order was entered, where the person seeking relief was not a party to the bankruptcy proceeding in which the order was entered and the motion to vacate alleges that the order is void?

3. Is the bankruptcy court a proper forum in which to assert that a prior order of that court was entered without jurisdiction?

4. Where a bankruptcy trustee has rejected executory leases by failing to assume them within 60 days following the trustee's qualification, or at any other time after the leases have been disclosed to the trustee, does the bankruptcy court lack jurisdiction over the leases?

The issue posed by Petitioners' question number 5 is encompassed in Respondents' question number 4.

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OPINIONS BELOW

Respondents accept the statement of Petitioners.

JURISDICTION

Respondents accept Petitioners' statement of jurisdiction but deny Petitioners' improper assertion that the issues Petitioners present are substantial.

STATUTES INVOLVED

Respondents accept the statement of Petitioners.

STATEMENT OF THE CASE

1. Course of Proceedings.

This case arises out of *ex parte* bankruptcy proceedings in which Petitioner Gordon H. Cheadle ("Cheadle") purchased two mineral leases from the successor trustee in the bankruptcy of Edward Lovitt. Cheadle then asserted superior title to the leases in quiet title actions in Washington State court, naming as defendants Respondents Appleatchee Riders Association, Cyprus Mines Corporation, and Asamera Minerals (U.S.), Inc. ("Appleatchee," "Cyprus," and "Asamera," respectively).[1] Respondents promptly moved the bankruptcy court to set aside its earlier orders confirming the sale of the leases to Cheadle. The bankruptcy court denied the motion, and Respondents appealed to the United States District Court for the Western District of Washington. The District Court reversed the bankruptcy court and vacated the sale, holding that the successor trustee had rejected the leases by failing to assume them and, therefore, could not dispose of them. Cheadle appealed to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals affirmed the decision of the District Court, holding that the bankruptcy court lacked jurisdiction to dispose of the leases because neither the original nor successor trustees had assumed them within the time required by law.

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[1] Pursuant to Supreme Court Rule 28.1, Respondents state as follows:

1. Asamera is a wholly owned subsidiary of Asamera Minerals, Inc., a Canadian corporation. Asamera is affiliated by a joint venture agreement with Breakwater Resources, Ltd., a Canadian corporation.

2. Cyprus is a wholly owned subsidiary of Cyprus Minerals Company, a Delaware corporation. Prior to July 1, 1985, Cyprus Minerals Company (formerly Amoco Minerals Company) was a wholly owned subsidiary of Standard Oil of Indiana, Inc., a Delaware corporation.

2. Pertinent Facts.

Edward Lovitt filed for bankruptcy under Chapter 7 on September 21, 1973. Fred Galer was appointed bankruptcy trustee and proceeded to make an exhaustive examination of Lovitt's mining and other business affairs. Although both leases had been duly recorded under Lovitt's name in Wenatchee, Washington (where the property was located and where Galer investigated Lovitt's affairs), and even though Lovitt's attorney sent Galer one of the leases by letter, Galer took no action in regard to the leases. He neither assumed the leases nor tendered payment of the accrued and unpaid back rentals owing on them. Lovitt's estate was closed on January 30, 1978.

Cheadle, who had been involved in the bankruptcy from its inception as a creditor and as a purchaser of assets, filed an *ex parte* petition to reopen the bankruptcy on November 21, 1980. Cheadle claimed in his petition that he had discovered unscheduled assets belonging to Lovitt, but he omitted all mention of the two leases at issue here.

By the time the petition to reopen the bankruptcy was filed, Appleatchee had succeeded to the fee ownership of one of the leasehold properties. Cyprus, in turn, had acquired a leasehold interest in the Appleatchee property and had succeeded to fee ownership of a portion of the other leasehold property. Neither Appleatchee nor Cyprus, whose property interests were duly recorded, was served with the petition to reopen.

The bankruptcy was reopened and Sheena Aebig was appointed successor trustee on November 25, 1980. Cheadle chose not to provide Aebig with copies of the leases until February 2, 1981. Aebig, like her predecessor Galer, did not tender the accrued and unpaid rentals or otherwise attempt to assume the leases at any time. Indeed, Aebig took no action at all until July 30, 1981, when she obtained an *ex parte* order authorizing her to sell without warranty her rights to the leases. Neither Appleatchee nor Cyprus was served with notice of these proceedings.

A notice of sale was filed on August 6, 1981, but was not served on Appleatchee or Cyprus, even though they had an obvious interest in any prospective auction of their property. Two bids were received at the sale: one from Cheadle and one from Asamera. At that time, Asamera was a complete stranger to these properties, claimed no property rights under the leases, and was simply making a blind bid. Aebig accepted Cheadle's bid and obtained *ex parte* orders confirming the sale of the leases to Cheadle on September 29, 1981, and October 22, 1981. Following the bankruptcy sale, Asamera entered into agreements with Cyprus and Appleatchee relative to the leasehold properties. Asamera's claim in the case at bar derives solely from those agreements.

In September 1983, nearly two years after Cheadle had acquired his deed and following press announcements of a major gold find by Asamera, Cheadle commenced a quiet title action against, *inter alia*, Appleatchee, Cyprus, and Asamera. In those proceedings, Cheadle asserted superior title to the leases based solely on the quit claim deed he had obtained from Aebig. Promptly upon commencement of those proceedings, Respondents moved to vacate the bankruptcy sale, and the proceedings in the case at bar ensued.

REASONS WHY THE WRIT SHOULD BE DENIED

1. This Case Does Not Merit Supreme Court Review.

Cheadle has not shown any reason for this Court to exercise its certiorari jurisdiction. The Court of Appeals' decision does not conflict with the decision of any other court. Moreover, no substantial or novel issues are raised which require resolution by this Court. Accordingly, Cheadle's petition for writ of certiorari should be denied.

The decision of the Court of Appeals is mandated by statute and consistent with a uniform line of cases that recognize the limited jurisdiction of the bankruptcy courts

to dispose of unexpired leases of real property. Section 70(b) of the Bankruptcy Act, 11 U.S.C. § 110(b) (1970), and Bankruptcy Rule 607 unambiguously require that an executory lease be assumed by the trustee before the bankruptcy court can dispose of it. Any lease that is not assumed is conclusively deemed rejected and does not become part of the bankrupt's estate. The bankruptcy court has no power to dispose of an asset that is outside the bankrupt's estate. Because the executory leases at issue in this case were never assumed by either the original or successor trustees, the bankruptcy court had no power to dispose of them. For these reasons, the Court of Appeals' decision was entirely correct and accords with the decision of every other court that has considered this issue. *See In re Tonry*, 724 F.2d 467 (5th Cir. 1984); *In re Cochise College Park, Inc.*, 703 F.2d 1339 (9th Cir. 1983); *In re Gravure Paper & Board Corporation*, 234 F.2d 928 (3rd Cir. 1956); *Fletcher v. Surprise*, 180 F.2d 669 (7th Cir.), *cert. denied*, 340 U.S. 824 (1950); *Palmer v. Palmer*, 104 F.2d 161 (2d Cir.), *cert. denied*, 308 U.S. 590 (1939).

Cheadle does not question the central holding of this case, *viz* that the bankruptcy court lacks power to dispose of an executory lease that has not been assumed. Instead, Cheadle asserts that a trustee should be permitted more than 60 days to assume an executory contract under certain circumstances. But because the leases at issue here were not assumed *at any time*, Cheadle's argument is entirely beside the point. If modification of the 60-day requirement set forth in Section 70(b) of the Bankruptcy Act would ever be appropriate, it is not in this case.

Cheadle also asserts that Section 70(b) should be considered a "rule of procedure" that can be ignored in the discretion of the bankruptcy court. Section 70(b), however, requires that "the trustee *shall* assume or reject an executory contract, including an unexpired lease of real property, within a 60-day period." (Emphasis supplied.) Moreover, Section 70(b) provides that any lease "not assumed or rejected within

that time *shall* be deemed to be rejected." (Emphasis supplied.) Congress has thereby mandated a "conclusive statutory presumption of rejection" by a trustee's "non-action within the sixty-day period." *In Re Gravure Paper*, 234 F.2d at 930. As the Court of Appeals held, this presumption completely forecloses Cheadle's claim

2. Cheadle's Legal Arguments Ignore the Facts of This Case.

Cheadle asserts that the 60-day rule should not be applied in this case because the leases, according to Cheadle, were not disclosed. But the district court specifically found that Cheadle disclosed the leases to successor trustee Aebig on February 2, 1981, 69 days after her appointment as trustee. Cheadle did not challenge the district court's factual finding on appeal. Had Cheadle provided the leases to Aebig immediately upon her appointment as trustee, moreover, even Cheadle would concede that Aebig would have had only 60 days within which to assume them. Because the leases were in fact disclosed, Cheadle's argument on this point can be dismissed summarily.

Cheadle also suggests that the trustee should be given a "reasonable" time to assume unscheduled executory leases. Section 70(b) of the Bankruptcy Act, however, makes no distinction between scheduled and unscheduled leases. Even if this distinction had merit, it is irrelevant here. Because the leases were never assumed at any time, the bankruptcy court had no power to dispose of them, whether scheduled or not.

Cheadle suggests throughout his petition that the Court of Appeals' decision might, under other circumstances, permit fraud or misconduct by a bankrupt. Cheadle's parade of horribles ignores that there is not one scintilla of evidence in this case of any such wrongful conduct. Successor trustee Aebig was aware of the leases and simply elected not to assume them. The Court of Appeals did not have a case of misconduct before it; its decision has no application to such

a case. Courts construing the Bankruptcy Act can fashion appropriate rules to deal with misconduct where it occurs. *See Texas Western Financial Corp.* v. *McCraw Candies, Inc.*, 347 F. Supp. 445 (N.D. Tex. 1972).

3. The Bankruptcy Court Cannot Dispose of an Asset Which Is Not Part of the Bankrupt's Estate.

Cheadle asserts that the Court of Appeals' decision unduly restricts the ability of the bankruptcy court to distribute assets of the bankrupt to the creditors. The issue in this case, however, is not whether the bankruptcy court has the power generally to distribute assets, but whether it has the power to distribute assets that by law do not become part of the bankrupt's estate.

It is fundamental that the bankruptcy court "cannot sell property which has not come to [the trustee] under the Bankruptcy Act." 4B *Collier on Bankruptcy* ¶ 70.97[5] at 1147 and n. 43a (14th ed. 1978). *See also In re Texas Consumer Finance Corp.*, 480 F.2d 1261, 1266 (5th Cir. 1973); *United States v. Neiwirth*, 370 F. Supp. 929, 934 (D.N.J. 1974). Any contrary holding would create chaos by permitting the bankruptcy court to dispose of property that Congress has provided is not within the court's jurisdiction.

4. Respondents Presented Bankruptcy Issues to the Bankruptcy Court, And They Had Standing To Do So.

Cheadle suggests that the Court of Appeals' decision will allow the bankruptcy court to try quiet title actions arising under state law. But Respondents did not seek to litigate title to the leases in bankruptcy court. Rather, Respondents' motion addressed the bankruptcy court's jurisdiction to dispose of the leases. This motion raised questions of federal law, *viz* the proper construction of both Section 70(b) of the Bankruptcy Act and Bankruptcy Rule 607. Such fundamental questions of bankruptcy law are appropriately addressed to the bankruptcy court. This Court long ago held that a bankruptcy court always has jurisdiction to consider its own jurisdiction. *In re Tax Service Ass'n of Illinois*, 305 U.S. 160 (1938).

The Court of Appeals, relying on *Allen v. Wright*, ___ U.S. ___, 104 S. Ct. 3315 (1984), properly held that Respondents had standing to challenge the bankruptcy court's sale of the leases. Respondents alleged an injury to their property rights (i.e., a cloud on Respondents' title) which was directly traceable to the bankruptcy court's unlawful exercise of jurisdiction, and which could be redressed by a motion before the bankruptcy court. These allegations fully entitled Respondents to adjudicate their claims in the bankruptcy court.

Cheadle asserts that only creditors and other parties to a bankruptcy proceeding may invoke the bankruptcy court's jurisdiction. But it is established law that an order entered without jurisdiction may be collaterally attacked by one who was not a party to the proceeding. *Arenas v. United States*, 197 F.2d 418, 420 (9th Cir. 1952); *Bradley v. St. Louis Terminal Warehouse Co.*, 189 F.2d 818, 824 (8th Cir. 1951) (attacking a bankruptcy order). If trustee Aebig purported to sell Cheadle the Empire State Building, there would be no doubt about the "standing" of the owners of that building to have such a sale set aside. The case at bar is no different.

Section 76 of the Restatement (Second) of Judgments (1980) provides that a non-party whose property interests are adversely affected by a judicial decision may seek a determination that the decision is of no effect. The facts of this case demonstrate that the rule is both salutary and necessary. Without questioning the validity of Section 76 of the Restatement, Cheadle argues that the rule has no application in a bankruptcy proceeding. As the Court of Appeals noted, however, the Restatement (Second) of Judgments has often been relied upon in bankruptcy matters. *See, e.g., In re Houtman*, 568 F.2d 651, 653 n. 2 (9th Cir. 1978). Because Section 76 is directly on point, the courts below appropriately referred to it in this case.

5. Fed. R. Civ. P. 60(b) Does Not Bar a Motion By Non-Parties, and Its One-Year Time Limit Does Not Apply to a Motion to Vacate a Void Judgment.

Because Respondents were not parties to the *ex parte* proceedings in which the leases were sold, Fed. R. Civ. P. 60(b) by its terms does not govern their motion to vacate the bankruptcy court's orders. Cheadle has not questioned the Court of Appeals' holding in this regard. Accordingly, the court's determination that Rule 60(b) does not prohibit Respondents' motion should stand.

Even if Fed. R. Civ. P. 60(b) were applicable, it would not bar the Respondents' motion. The rule's one-year time limit does not apply to a motion to vacate a void order. Cheadle acknowledges this. Changing tack, he argues for the first time that the Respondents did not bring their motion within a "reasonable time." Quite apart from Cheadle's failure to raise this argument below, it is without merit. Respondents filed their motion in the bankruptcy court within three months after Cheadle had filed a quiet title action against them.

In any event, as Professor Moore states: "The theory underlying the concept of a void judgment is that it is legally ineffective — a legal nullity; and may be vacated by the court which rendered it *at any time.*" 7 *Moore's Federal Practice* ¶ 60.25[4] at 60-241 (emphasis supplied).

CONCLUSION

For the reasons stated above, Respondents respectfully submit that there is no reason for this Court to exercise its certiorari jurisdiction. The Petition for Writ of Certiorari should be denied.

DATED this 5th day of September, 1985.

Respectfully submitted,

Michael A. Small*
Paul J. Lawrence
PRESTON, THORGRIMSON,
ELLIS & HOLMAN
2000 IBM Building
Seattle, WA 98101
(206) 623-7580
Attorneys for Respondents
* *Counsel of Record*

APPENDIX A

Bankruptcy Act, 11 U.S.C. § 110 (1970)

§ 70. Title to Property.

b. The trustee shall assume or reject an executory contract, including an unexpired lease of real property, within sixty days after the adjudication or within thirty days after the qualification of the trustee, whichever is later, but the court may for cause shown extend or reduce the time. Any such contract or lease not assumed or rejected within that time shall be deemed to be rejected. If a trustee is not appointed, any such contract or lease shall be deemed to be rejected within thirty days after the date of the order directing that a trustee be not appointed. A trustee shall file, within sixty days after adjudication or within thirty days after he has qualified, whichever is later, unless the court for cause shown extends or reduces the time, a statement under oath showing which, if any, of the contracts of the bankrupt are executory in whole or in part, including unexpired leases of real property, and which, if any, have been rejected by the trustee. Unless a lease of real property expressly otherwise provides, a rejection of the lease or of any covenant therein by the trustee of the lessor does not deprive the lessee of his estate. A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same at his election and subsequently assigning the same; but an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same is enforceable. A trustee who elects to assume a contract or lease of the bankrupt and who subsequently, with the approval of the court and upon such terms and conditions as the court may fix after hearing upon notice to the other party to the contract or lease, assigns the contract or lease to a third person, is not liable for breaches occurring after the assignment.

APPENDIX B

Bankruptcy Rule 607

Assumption, Rejection, and Assignment of Executory Contracts

Within 30 days after the qualification of the trustee, unless the court for cause shown extends or reduces the time, the trustee shall file a statement showing any executory contracts of the bankrupt, including unexpired leases, which the trustee has assumed. Whenever practicable, the trustee shall obtain approval of the court before he assumes a contract. Any such contract not assumed within 60 days after qualification of the trustee, or within such further or reduced time as the court may allow within such 60-day period, shall be deemed to be rejected. If a trustee does not qualify, any such contract shall be deemed to be rejected at the expiration of 60 days after the date of an order directing that a trustee be not appointed, or at such earlier or later time as the court may fix within such 60-day period. On application by the trustee for authority to assign any contract he has assumed pursuant to this rule, the court shall determine the matter after hearing on notice to the other party to the contract.